STATE OF MICHIGAN

COURT OF APPEALS

DEBRA JOHNSON,

Plaintiff-Appellant,

v

DETROIT FEDERATION OF TEACHERS and SCHOOL DISTRICT FOR THE CITY OF DETROIT,

Defendants-Appellees.

UNPUBLISHED
January 24, 2006

No. 256289
Wayne Circuit Court
LC No. 02-219368-CK

Before: Cavanagh, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff, Debra Johnson, appeals by right an order granting summary disposition in favor of defendant Detroit Federation of Teachers ("DFT" or "the union"). Plaintiff also challenges an earlier order granting summary disposition in favor of defendant the School District for the City of Detroit ("DSD" or "the district"). On appeal, plaintiff argues that there were general issues of material fact in dispute regarding whether DSD breached its collective bargaining agreement (the "CBA") with DFT and whether DFT breached its duty of fair representation in administering the CBA's grievance process. She further argues that DSD is liable for damages for its failure to expel students pursuant to MCL 380.1311 (a provision of the "Safe Schools Act"). We affirm.

Plaintiff's suit alleges defendants failed to respond to several separate incidents that occurred between plaintiff and three Redford High School ("Redford") students in March and April 2001. During that time, plaintiff was an English teacher at Redford and was a member of a union bargaining unit that was represented by DFT. Although plaintiff's brief on appeal is somewhat unclear regarding which incidents are the focus of her appeal, she primarily discusses defendants' actions with regard to a particular student, TN,[1] whom plaintiff alleges sexually assaulted her. Therefore, we largely address these particular incidents; however, we note that our reasoning also substantially applies to the other incidents referenced.

[1] We will refer to the students by their initials for the sake of anonymity.

Plaintiff claims that in March 2001, TN walked up behind her and put his hand on her hip while she was on hall duty outside her classroom. Then, on a separate occasion, plaintiff was walking down a hallway when she saw TN coming toward her with his hands out "which indicated [that] he was about to touch" her. She explained: "I had a key in my hand and I pushed back at him and I took my key and I stuff [sic] it in his chest and he said ouch." Finally, on March 30, 2001, plaintiff was passing TN while walking down a corridor to the lunchroom when TN turned around and put his hand on her rear end.

After the first incident, plaintiff contacted the head of the English Department, Patricia Holmes, whom plaintiff claims did not take the incident seriously. Plaintiff did not take further action after the second incident because she did not feel she had administrative support; She also hoped she could resolve the situation by speaking with TN's mother and that the incidents were "over." But, after the third incident, plaintiff made requests to Holmes and Principal Robert Hodge that TN be transferred to another school. Soon after, in late April 2001, two other students, MR and AS, approached plaintiff in her classroom and touched her hips. She requested that Holmes suspend the students. Plaintiff attested they "may have received a class suspension but . . . were never suspended from school."

When plaintiff realized that none of the three students had been transferred, she filed a grievance in accordance with the CBA's grievance procedure. Step 1 of the procedure allows a teacher to submit a written grievance to the relevant school principal, who is then required to respond in writing within ten school days. Step 2 provides that "the Union may appeal" this decision to the CEO of the district or the CEO's designee within ten school days after receiving the decision. The CEO is then required to investigate within ten school days after delivery of the appeal and to provide a written decision within 15 school days after delivery of the appeal. Step 3 gives DFT "exclusive" discretionary authority to submit a grievance to binding arbitration within 30 school days if DFT is dissatisfied with the CEO's decision. (CBA, Article XXII.)

On May 22, 2001, plaintiff filed a grievance alleging that Hodge and Holmes had violated the employment contract by failing "to provide appropriate administrative backing" during the incidents involving TN, MR and AS; she requested that the three students be transferred. Hodge later provided a written response denying the request. Plaintiff urged Keith Johnson ("Johnson"), DFT's Director of Staff Operations, to appeal the grievance to Step 2; she based this request, in part, on her additional claim that the Safe Schools Act required DSD to expel TN from the district.

Meanwhile, plaintiff also pursued criminal charges against TN for the March 30, 2001, incident. She then filed another grievance on December 5, 2001, and requested that TN be expelled pursuant to MCL 380.1311a because she claimed that he pleaded guilty in Juvenile Court to fourth-degree criminal sexual conduct. Hodge responded that TN would not be removed until Hodge received official notification of the conviction. Plaintiff attested that on December 10, 2001, Johnson told her the grievance would be appealed to Step 2, but that he later told her he would not take further action until she provided documentation of the conviction. By February 2002, TN's parents withdrew him from Redford, and, at least at the time of plaintiff's November 12, 2002, deposition, MR and AS also no longer attended Redford. Nonetheless, plaintiff brought suit alleging that the Safe Schools Act had not been enforced and that she lost job prospects and suffered emotional problems as a result of defendants' failures to act and from Hodges' later retaliatory action against her.

We review de novo the trial court's grant of summary disposition in favor of both defendants. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A summary disposition motion pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *West, supra* at 183. When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996). When deciding a motion for summary disposition under subrule (C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Quinto, supra* at 362. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West, supra* at 183.

The construction and interpretation of a contract also presents a question of law that is reviewed de novo. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand),* 463 Mich 504, 511; 620 NW2d 531 (2001). The goal of contract construction is to determine and enforce the parties' intent based on the plain language of the contract itself. *UAW-GM Human Resource Center v KSL Recreation Corp,* 228 Mich App 486, 491; 579 NW2d 411 (1998). A court must first determine as a matter of law whether the language is clear and unambiguous; if so, its meaning presents a question of law for the courts to determine. *Id*. The language should be construed according to its plain and ordinary meaning; the court should avoid technical or constrained constructions. *Id.* at 491-492. On the other hand, contract language is ambiguous if it may be reasonably understood in different ways. *Id.* at 491. If the language is found to be ambiguous or unclear, the trier of fact must determine the intent of the parties. *Id.* at 492.

Plaintiff's combined claims that DSD breached the CBA and that DFT unfairly represented her under the CBA's grievance process are commonly referred to as a "hybrid § 301" claim. The phrase refers to § 301, 29 USC 185, of the Labor Management Relations Act, 29 USC 141 *et seq.*, on which Michigan's public employment relations act (the "PERA"), MCL 423.201 *et seq.*, is patterned; Michigan courts refer to federal law interpreting this section of the federal act when addressing suits governed by the PERA. *Murad v Professional and Administrative Union Local 1979,* 239 Mich App 538, 542-543; 609 NW2d 588 (2000). To prevail on such hybrid claims, a plaintiff must establish *both* that the union breached its duty of fair representation and the employer breached the collective bargaining agreement. *Knoke v East Jackson Pub School Dist,* 201 Mich App 480, 485, 488; 506 NW2d 878 (1993).

The PERA also establishes the statutory duty of fair representation that unions owe to public sector employees. *Goolsby v Detroit,* 419 Mich 651, 660 n 5; 358 NW2d 856 (1984). This duty

> is comprised of three distinct responsibilities: (1) "to serve the interests of all members without hostility or discrimination toward any", (2) "to exercise its discretion with complete good faith and honesty", and (3) "to avoid arbitrary conduct". A union's failure to comply with any one of those three responsibilities constitutes a breach of its duty of fair representation. [*Id.* at 664, quoting *Vaca v Sipes,* 386 US 171, 177; 87 S Ct 903; 17 L Ed 2d 842 (1967).]

Accordingly, a union breaches the duty when its conduct is arbitrary, discriminatory *or* in bad faith. *Goolsby, supra* at 661, 664. Here, although it is somewhat unclear, plaintiff appears to claim that DFT behaved arbitrarily in processing her grievances.

A union is allowed some level of discretion with regard to the administration of a grievance process. For instance, an employee does not have "an absolute right to have his grievance taken to arbitration, because, for the grievance machinery to work properly, the union must be given considerable discretion to determine which grievances to press and which to abandon." *Demings v City of Ecorse*, 423 Mich 49, 70; 377 NW2d 275 (1985), citing *Vaca, supra* at 190-191. However, the union may not administer the process arbitrarily. Moreover, arbitrary or perfunctory conduct does not require a "dishonest or fraudulent intention." *Goolsby, supra* at 679. Rather, for purposes of the PERA, such conduct is defined broadly to include the prohibition of impulsive, irrational or unreasoned conduct, as well as "inept conduct undertaken with little care or with indifference to the interest of those affected." *Id.* Such inept conduct includes but is not limited to:

> (1) the failure to exercise discretion when that failure can reasonably be expected to have an adverse effect on any or all union members, and (2) extreme recklessness or gross negligence which can reasonably be expected to have an adverse effect on any or all union members. [*Id.*]

Here, we agree with the trial court that plaintiff has not created a genuine issue of material fact regarding whether DFT behaved arbitrarily. The crux of plaintiff's underlying claim that DSD breached the CBA appears to be that DSD breached its own Student Code of Conduct (the "SCC"), which, in turn, incorporates provisions of the Safe Schools Act. She then argues that the CBA incorporates the SCC; therefore, violation of the code both violates the CBA and may be addressed through the CBA's grievance procedure.

The Student Code clearly requires the expulsion of students who physically assault staff members or who commit criminal sexual conduct on school grounds because such expulsion is required by state law. See MCL 380.1311(2); MCL 380.1311a(1).

We agree with plaintiff that it was likely contemplated that the CBA incorporate the SCC. Section XXV of the CBA provides that "all District policies and procedures are part of the Collective Bargaining Agreement." The SCC is arguably a "policy" of DSD. On the other hand, the terms of the CBA do not unambiguously exclude the Student Code; therefore, it would be the factfinder's role to determine whether the SCC represents a "policy" reflecting the parties' intentions. In addition, we agree with plaintiff that the CBA's grievance provision contemplates enforcement both of actual CBA provisions *and* of other policies. Grievances include complaints "that there has been a deviation from, or a misinterpretation or misapplication of a practice or policy; *or* that there has been a violation, misinterpretation, or misapplication of any provision of [the CBA]." CBA, Article XXII, Section A (emphasis added).

Nevertheless, we conclude that the SCC is irrelevant to the facts of this case. The code was issued in September 2001, but the incidents involving TN, MR and AS occurred in March and April 2001 and plaintiff's first grievance was filed in May 2001. Plaintiff does not provide any proof or argument that the SCC's provisions were intended to apply retroactively. She merely cites a letter of understanding contained in the CBA, which provides in its entirety: "A

stronger Student Code of Conduct will be developed by the District after consultation by a committee that includes representatives from [DFT]."

Plaintiff offers no other clear arguments regarding how the CBA incorporates provisions of the Safe Schools Act; she merely lists several disciplinary provisions of the CBA, cites defendants' inaction, and then concludes, "[c]learly it is within the scope of the CBA that assaults upon teachers by students be enforced under school policies and state law by the union." With regard to DFT's representation, she adds, "[i]n the case at bar, DFT failed to administer any support to [plaintiff] and to inform her regarding her grievances." She does not explain under which provision DFT was required to "inform" her regarding her grievances or what detriment she suffered as a result of DFT's failure in this regard. Nor does she explain what action she now argues DFT should have taken – beyond requiring expulsion – other than "to administer any support," "to administer the [CBA]," to seek compliance with "the laws and statutes of the State of Michigan," and to prevent the DSD from disregarding the CBA and "school law."

Plaintiff also appears to argue that DSD separately breached the CBA's general discipline provisions through DSD's alleged complete inaction in response to plaintiff's complaints. The provisions require, for instance that principals support teachers in maintaining school discipline (CBA, Article VIII, Sections J and M), that the police department be called if a crime is committed on school grounds (Section F), that assaults against teachers "in which there appears to have been malicious intent" be reported to police, and that the Legal Affairs Office of the DSD assist teachers after they've reported assaults (Section K). Nonetheless, plaintiff does not explain what action DFT should have urged DSD upon regarding appeals of plaintiff's grievances other than to request that the students be expelled.

To properly present an issue for consideration on appeal, a party may not merely give cursory treatment of an issue and leave it to the Court to elaborate her arguments. *Goolsby, supra* at 655 n 1. Even if there is some evidence from which a factfinder could conclude that DSD breached the general provisions of the CBA just noted, a factfinder could not conclude on these facts that DFT breached its duty of fair representation. This is particularly true in light of the fact that plaintiff never provided documentation of TN's conviction. Moreover, DFT could have reasonably determined that the CBA did not incorporate the SCC at the time the assaults were committed. Just as significantly, even if an argument exists that the code should have applied to TN's alleged 2001 conviction, DFT reasonably acted within its discretion when it decided against pressing this ambiguous issue. For these reasons, we also find plaintiff's argument that DFT unreasonably required her to provide documentation of TN's conviction largely irrelevant; DFT could have reasonably chosen not to urge DSD to expel TN regardless of whether he was actually convicted. Therefore, because we hold that the trial court did not err in concluding the DFT did not breach its duty of fair representation, plaintiff's related claim that DSD breached the CBA was also properly dismissed.

Plaintiff also attempts to argue on appeal that the trial court erred when it concluded that DSD did not violate MCL 380.1311a(1). Our review of the record shows that the court merely found that plaintiff's cause of action properly was a hybrid claim under the CBA. In support of her argument, plaintiff provides excerpts from various opinions of this Court regarding the mission of public school systems. She cites the provision of DSD's Student Code, which requires the expulsion of students who commit criminal sexual assault. She does not explain why these items are relevant to her direct claim for damages under MCL 380.1311a(1).

Consequently, we again find that plaintiff has not properly presented this issue for appeal, but, we also note that the Safe Schools Act does not appear to authorize plaintiff to bring a private cause of action. The trial court also correctly dismissed plaintiff's claims against DSD for this reason.

The interpretation and application of a statute present questions of law that we review de novo. *Eggleston v Bio-Med Applications of Detroit, Inc,* 468 Mich 29; 658 NW2d 139 (2003). The primary goal of judicial interpretation of a statute is to give effect to the Legislature's intent. *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 695; 588 NW2d 715 (1998). A court should initially look to the specific language of the statute; the Legislature is presumed to have intended the meaning expressed by its plain language. *Id.*

> Generally, when a statute creates a new right or imposes a new duty, the remedy provided by the statute to enforce the right, or for nonperformance of the duty, is exclusive. Where the common law provides no right to relief, but the right to relief is created by statute, a plaintiff has no private cause of action to enforce the right unless (1) the statute expressly creates a private cause of action, or (2) a cause of action can be inferred from the fact that the statute provides no adequate means of enforcement of its provisions. [*Id*. at 695-696 (citations omitted).]

Here, we do not find a provision of the Safe Schools Act that expressly creates a private cause of action. Moreover, we note that MCL 380.1804 contained in the Revised School Code, MCL 380.1, *et seq.*, of which the Safe Schools Act is a part, provides:

> Except as otherwise provided in this act, a school official or member of a school board or intermediate school board or other person who neglects or refuses to do or perform an act required by this act, or who violates or knowingly permits or consents to a violation of this act, is guilty of a misdemeanor punishable by a fine not more than $500.00, or imprisonment for not more than 3 months, or both.

Accordingly, we conclude that the Revised School Code provides an "adequate means of enforcement of its provisions," including MCL 380.1311a(1), and therefore, that a private cause of action may not be inferred from a lack thereof.

We affirm.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Jane E. Markey